United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-6005

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Case No. 75-6005

CHELSEA NEIGHBORHOOD ASSOCIATIONS, PENN SOUTH PARENTS, CHELSEA-ELLIOTT TENANTS ASSOCIATION, COUNCIL OF CHELSEA BLOCK ASSOCIATIONS, KELVIN L. and ELLA MARIE KEAN, BEVERLY RUBIN and FRANCES LOPATIN,

Plaintiffs-Appellees,

- against -

UNITED STATES POSTAL SERVICE and E.T. KLASSEN, individually and as Postmaster General,

Defendants-Appellants.

Dated: April 3, 1975

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ERRATA SHEET

for

BRIEF FOR PLAINTIFFS-APPELLEES,
CHELSEA NEIGHBORHOOD ASSOCIATIONS, ET AL.

CHELSEA NEIGHBORHOOD ASSOCIATIONS, et al.,

v.

U.S. POSTAL SERVICE, et al.

No. 75-6005

1. On page 48, line 12, "485" should read "458."

2. On page 53, line 4, "220" should read "2200."

3. On page 53, line 15 (9 lines from bottom of page), "not" should read "no."

4. On page 62, line 14, "Alabana" should read "Alabama."

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UNITED STATES COURT OF APPEALS
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BRIEF FOR CHELSEA NEIGHBORHOOD ASSOCIATIONS et al., PLAINTIFFS-APPELLEES

INTRODUCTORY STATEMENT

This brief is submitted on behalf of the Chelsea Neighborhood Associations and the other named plaintiffs-appellees ("plaintiffs") in answer to the brief on appeal filed by the defendants-appellees, United States Postal Service and E.T. Klassen, and in support of plaintiffs' motion to dismiss those portions of the appeal which seek to bring before this Court a series of issues under the Clean Air Act which were not reached by the court below.

The Postal Service appeals from an order entered in the Southern District of New York on February 28, 1975 [Exh. NN]*, which granted the plaintiffs a preliminary injunction against the construction of a so-called Vehicle Maintenance Facility (hereinafter, the "VMF" or "Garage") between Ninth and Tenth Avenues and 28th and 29th Streets in the Chelsea section of Manhattan. The order followed the filing of a memorandum opinion, as yet not officially reported but set forth as Exhibit MM of the Joint Appendix, signed by United States District Judge Robert J. Ward on February 25, 1975.

In its opinion, the District Court concluded that contrary to the Postal Service's claims, the National Environmental Policy Act [42 U.S.C. §4321 et seq.]("NEPA") does apply to the Postal Service and the Garage project in Chelsea. The Court further concluded that the environmental impact statement ("EIS")[Exh. A]** prepared and filed for the Garage was inadequate in a number of respects, including the failure to account for relevant environmental impacts and to meaningfully consider available alternatives. On this basis, the Court concluded that plaintiffs were entitled to injunctive relief and

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* The prefix "Exh." denotes references to the record items contained in the "Joint Appendix" filed by the defendants with this Court.

**To avoid confusion, references to the EIS will be denoted as "EIS, p. _____".

that defendants' motion to dismiss or for summary judgment should be denied.

In addition to the NEPA claims, plaintiffs had also argued to the District Court that an injunction should issue due to the failure of the Postal Service to comply with the Clean Air Act [42 U.S.C. §1857 et seq.] and implementing state regulations, while the Postal Service, for its part, had moved to dismiss the clean air claims as inapplicable to it. In issuing his opinion, however, Judge Ward did not reach the clean air questions or base injunctive relief on those claims; and in denying the motion to dismiss, he did so without prejudice in respect of the clean air issues. Nonetheless, the Postal Service seeks to raise them before this Court.

Plaintiffs submit that the clean air claims are not ripe for review on appeal and have accordingly moved to dismiss that part of the appeal.* In other respects, plaintiffs rest on the order and opinion of the District Court below.

ISSUES PRESENTED FOR REVIEW

1. Whether NEPA applies to the United States Postal Service and major projects which it undertakes?

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* A separate motion to dismiss was filed with this Court on March 21, 1975. For convenience, the principal arguments in support of dismissal are set forth in Point Three of this Brief.

2. Whether, as the District Court concluded, the EIS prepared for the VMF is inadequate?

3. Whether this Court should decide questions on appeal that were not reached by the District Court below and did not serve as a basis for injunctive relief?

4. If Question 3 is answered in the affirmative, whether the Postal Service is bound by applicable clean air laws?*

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs in this action including individual residents living in close proximity to the proposed Chelsea Garage site and five neighborhood groups which represent practically the entire Chelsea community, including housing cooperative and tenants' organizations, block associations, parents' groups, a labor union, a synagogue, homeowners and others, all of whose interests and health could be jeopardized by the operation of the VMF on the Chelsea site. Plaintiffs seek an injunction against construction of the VMF unless and until there has been full compliance with NEPA and the Clean Air Act.

The action was commenced in August 1974, after plaintiffs' demand upon the Postal Service to abandon the VMF had

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* The relevant statutes are set forth at the outset of the Appellants' Brief.

been rejected. In January 1975, plaintiffs moved for a preliminary injunction to prevent the Postal Service from entering a contract for or otherwise proceeding with construction of the facility. The Service, in turn, moved to dismiss the complaint or, alternatively, for summary judgment. In an opinion issued on February 25, 1975 and order signed on February 28, Judge Ward, as noted, granted plaintiffs' motion and denied the defendants'.

The Postal Service, anxious to begin construction immediately, now appeals.

B. Statement of Facts

The subject matter of this action, as described by the District Court drawing directly from the EIS, is the proposed construction

> "of a major U.S. Postal vehicle maintenance facility (VMF) in combination with a multi-story housing project in . . . [Chelsea]. The project will occupy an entire city block, presently vacant, adjacent to the Morgan Station mail processing center. Features of the proposed action are a multi-story VMF, a housing project of approximately 860 units utilizing air rights space above the VMF, and the closure of 29th Street between Ninth and Tenth Avenues to non-postal traffic, except during the evening rush period. (EIS at 1)" [Opinion, Exh. MM, p. 1].

The Garage itself would be a vast structure containing 800,000 feet of interior space. Located immediately north of

Chelsea Park and Public School 33, and just west of the Penn South housing complex at the northern end of the Chelsea residential community, its concrete walls would rise directly from the sidewalk for approximately 80 feet. Parking spaces for 918 postal vehicles, including 771 trucks, 93 tractors and 24 trailers, would be contained within it, plus repair and maintenance facilities for these vehicles [EIS, p. I-1]. The direct costs of construction are currently projected at $36.5 million, with total costs, including overheads, design and land, estimated at $45 million [Exhs. T; JJ].

Vast amounts of traffic will be generated by the Garage. Two thousand two hundred truck trips to and from the building are estimated to occur each week day. A constant flow of 5-ton diesel trucks at the rate of 30 to 60 trips per hour is projected. In addition, there will be heavy, light and medium vehicle traffic with peak activity expected between 5 and 7 A.M. when the rate will reach 160-180 movements per hour. Fifteen hundred postal employees will work out of the building who themselves will generate considerable traffic. This traffic density will be imposed on an area which is already glutted with traffic, including heavy truck traffic to and from the Morgan Postal Station which now exists north of the VMF site.

The top of the Garage is projected to be a flat platform and on top of this, present plans call for a housing

project. This was authorized by an act of Congress [PL 92-313], which permits the conveyance of the air rights to New York City for residential use. At the time the final EIS was issued, plans for the housing component provided for a total of 864 apartment units divided between two 27-story towers and two low-rise apartment clusters. Since then, the plans have become less certain, with a single tower project apparently considered at one time. However, according to an affidavit submitted to the lower court [Exh. E], the VMF bid drawings included ducts, shafts, foundations and the like "for a specific high rise apartment tower complex", which apparently suggests a return to the earlier design or some variation.

In any event, both conceptually and structurally the housing and the VMF components are interrelated. Thus, according to the EIS, they comprise a "structurally integrated VMF-housing project". [EIS, p. I-5]. More importantly, the Garage is to provide the foundation and base for the housing, and determines many aspects of the housing design. In this regard, the EIS is once again explicit, noting, among other things, that:

> "The configuration of the housing component of the project -- that is, high-rise apartment towers on the avenues and low-rise units mid block -- has been dictated largely by the interior spatial and circulatory requirements of the VMF." [EIS, p. VIII-3] (quoted in the District Court's Opinion, Exh. MM, p. 4).

Furthermore, as the District Court pointed out, the VMF is dependent on housing towers for its exhaust system [Opinion, Exh. MM, p. 5].

This, then, is the project for which the Postal Service has advertised for bids -- subject to one critical exception. The plans for the Garage are complete, but there is no design, not even any layout, for the housing. Furthermore, there is no guarantee of money for construction or of subsidies adequate to ensure low and middle-income rentals. Yet after selling the VMF to the community on the basis of the housing benefits, the Postal Service is prepared to proceed without it. For this reason, among others, plaintiffs have sought injunctive relief.

C. The Proceedings to Date

As the District Court notes [Opinion, Exh. MM, p. 2], it appears that the Postal Service began considering construction of the VMF as early as 1971. However, it was not until late 1972 that the preparation of an impact statement began -- and it was the Corps of Engineers that undertook to do so, apparently as agent for the Postal Service. Several drafts were subsequently circulated and subject to severe community criticism. However, when the Final EIS was filed with the Council on Environmental Quality in April 1974, it reflected the decision to proceed with the VMF at the Chelsea site.

In July 1974, plaintiffs, through their attorneys, formally asked the Postal Service to reverse its decision to proceed with the VMF in Chelsea, and at the same time, called the Service's attention to the availability of an alternative and existing truck terminal and maintenance facility -- to wit, the Yale Express Garage, nine blocks to the north and west of the Garage site [Exh. DD]. The Yale Garage has not been mentioned in the EIS, but as noted in plaintiffs' demand letter, was for sale and could be modified to meet Postal Service needs at a lower cost than construction of a brand new facility.

By letter dated August 15, 1974*, the Postal Service rejected plaintiffs' formal request to abandon the Garage without any reference to or apparent consideration of the Yale facility. Thereafter, on August 26, 1974, plaintiffs filed their complaint [Exh. KK] commencing this action.

On or about November 15, 1974, the Postal Service advertised bids on the project. In January 1975, plaintiffs, as heretofore noted, moved for a preliminary injunction to keep the Postal Service from proceeding with construction on the grounds that the Service had not complied either with NEPA or with the Clean Air Act and implementing State regulations. The

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* Omitted by appellants from the Appendix but part of the record below.

Postal Service, represented by the United States Attorney's Office for the Southern District of New York, moved at the same time to dismiss the complaint, asserting that (a) it was exempt from the application of NEPA, (b) it had, in any event, complied adequately with the statute, and (c) it was not subject to the requirements of the Clean Air Act.

Oral argument on the motions, without an evidentiary hearing, was held by Judge Ward on January 17, 1975, after counsel agreed that issues involving disputed questions of fact -- specifically, the air pollution and noise impacts of the Garage and the feasibility of the Yale Garage as an alternative -- need not be tried in connection with the pending motions unless the Judge could not reach a decision on other grounds. Such a trial proved to be unnecessary.

On February 25, 1975, the District Court issued its decision and, three days later, signed the preliminary injunction from which the Postal Service now appeals.

D. The District Court's Decision

In its opinion, the District Court first reviewed the relevant facts and history surrounding the VMF, drawing on the EIS descriptions of the projected dimensions and traffic and the integral relationships -- both conceptual and structural -- between the Garage and housing components.

The Court next addressed itself to and rejected the Postal Service's claim that it was exempt from NEPA, noting that neither the language or legislative history of the Postal Reorganization Act, nor the relevant case law supported such a claim. By contrast, NEPA expressly requires that other Federal laws be interpreted and administered in accordance with its policies "to the fullest extent possible".

Turning then to the Postal Service's purported compliance with NEPA, the Court held that the EIS that had been filed did not comport with the statutory requirements, in that, among other things, it used the air rights housing as a principal justification and benefit of the VMF Garage, but did not evaluate the resulting environmental impacts. The Court also pointed to failures of disclosure and an improper segmentation of the housing portion of the overall project; and it concluded as well that the "no action" and "scatter site" alternatives to the VMF were not dealt with adequately.

E. What the District Court Did Not Decide

As previously noted, prior to appearing before Judge Ward on the respective motions, counsel agreed that any evidentiary hearing would be deferred, and that argument would be limited to the issues that could be decided on the law or from the face of the EIS. In particular, counsel

recognized that plaintiffs' air pollution and noise claims involved disputed issues of fact, as did their contention that the Yale Express Garage offered a viable and, indeed, preferable alternative. And it was understood that if the Court deemed it necessary to reach these issues in deciding whether or not plaintiffs' motion or defendants' should be granted, a subsequent evidentiary hearing would be held.

Judge Ward did not, however, find it necessary to reach these questions. His opinion rests on the conclusion that NEPA applies to the Postal Service and thus regulates its activity with respect to the VMF, and that the EIS is inadequate on its face for the reasons summarized above. Contrary to the assertions in the appellants' brief (pp. 9, 37-38), Judge Ward made no finding that the EIS adequately considered the air pollution, noise and related impacts of the VMF, nor did he pass judgment one way or another on the viability of the Yale Express alternative. He simply never reached these questions. Similarly, he never considered whether the Clean Air Act applies to the Postal Service or whether the Service is required to obtain an indirect source permit for the VMF, as both plaintiffs and the State of New York believe to be required [Exh. R].

POINT ONE

THE DISTRICT COURT CORRECTLY HELD THAT NEPA APPLIES TO THE POSTAL SERVICE

The Postal Service concedes that the language of NEPA alone would require the filing of an EIS with respect to the VMF (Appellants' Brief, p. 17). It maintains, however, that Section 410 of Title 39 of the United States Code (The Postal Reorganization Act) exempts it from the application of NEPA. This Section provides in part that except as otherwise noted, "no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets or funds, including Chapter 5 and 7 of Title 5, shall apply to the exercise of the powers of the Postal Service." Judge Ward properly rejected the argument that this language was intended to exempt the Postal Service from compliance with NEPA, basing his holding on a review of the relevant cases and on the language of the statutes themselves.

A. Existing Precedent Supports the Holding that NEPA Applies to the Postal Service

In dealing with the Postal Service's argument that 39 U.S.C. §410 exempts the Service from compliance with NEPA, the District Court addressed itself initially to the few cases that have dealt with the Postal Service's obligation under the Statute. In this connection, Judge Ward noted that only one case had dealt

specifically with the exemption claim, to wit, City of Thousand Oaks v. United States, decided initially in the District Court [Civ. No. 74-2186 (C.D. Calif., Sept. 3, 1974)] and then reviewed on appeal by the Ninth Circuit [_____ F.2d _____ (9th Cir., Oct. 1, 1974; No. 74-2685]*. In that case, the Postal Service had begun construction of a new post office in Thousand Oaks without having issued a detailed environmental impact statement under NEPA; instead, the Service had concluded in a "negative statement" that no detailed statement was required. The City of Thousand Oaks sued to enjoin construction until a detailed statement was issued. Relying on 39 U.S.C. §410, the District Court dismissed the complaint, holding that NEPA did not apply to the Postal Service.

On appeal, the Ninth Circuit affirmed the District Court's judgment, but in doing so, it expressly disapproved the basis on which the District Court dismissed, and clearly indicated that NEPA applies to the Postal Service. Thus, it stated:

> "The district court, while granting a temporary restraining order, dismissed the action brought by Thousand Oaks against the United States Postal Service, and denied a temporary injunction. We do not approve the basis upon which the trial court dismissed, but we affirm that judgment.
>
> "We have the full record before us and it appears that the negative statement by the Postal Service is adequate to show no environmental impact."

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* The opinions in these cases are apparently not yet officially reported; however, copies have been provided to this Court by the Postal Service as an annex to its brief.

Judge Ward took note of this decision, and indicated that "it does . . . suggest that defendants' reliance on §410 for relief from the requirements imposed by NEPA is misplaced" [Opinion, Exh. MM, p. 8]. Nonetheless, because of the summary nature of the Ninth Circuit decision, he treated the case as of limited precedential value. In this regard, we suggest, he was too kind to the Postal Service; for unless NEPA applied to the Service, there would have been no need or reason for the Court to review the negative statement.* In doing so, and in specifically disapproving the basis on which the trial court dismissed, the Ninth Circuit clearly indicated its view that the Postal Service is subject to NEPA.

The Postal Service attempts to distinguish the Ninth Circuit's conclusions on the grounds that "the Court may have decided 'not to approve the basis on which the trial court dismissed' on grounds other than disagreement with the applicability of NEPA", and suggests that the basis for disapproval may have been involvement of other Federal agencies. But this is pure fancy. The specific holding of the District Court was that "the National Environmental Policy Act [did not]

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* The negative statement referred to was, of course, a negative impact statement under NEPA by which the Postal Service determined that, due to the limited environmental impacts, no full-scale EIS was required. The basis for using a "negative statement" to justify not preparing a full EIS, and the standards of judicial review in such cases, are discussed in, among other cases, Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972) and Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972). In the instant case, of course, no contention is made that if NEPA is applicable, something less than a full EIS is required.

apply to the Postal Service' and for this express reason, the action was dismissed [Slip Op., p. 5]. When, therefore, the Circuit Court disapproved the "basis on which the trial court dismissed", it could only have been referring to the trial court's conclusion that NEPA did not apply to the Postal Service.*

Furthermore, even assuming for the sake of argument that the Ninth Circuit relied on the involvement of other Federal agencies, such involvement is not lacking here. Thus, in this case, as in Thousand Oaks, the U.S. Army Corps of Engineers prepared the environmental analysis on behalf of the Postal Service. In addition, as acknowledged in the Postal Service's brief, the Corps took the lead in meeting with New York City agencies; selected the architect/engineer for the VMF; negotiated and was otherwise involved in the design of the project; and, in sum, had responsibility for the VMF until July 1974 [Appellants' Brief, pp. 9-13]. The Postal Service also admits that the U.S. Department of Housing and Urban Development ("HUD") is expected to fund the apartments above the VMF, thereby providing yet another Federal link. Under

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* The District Court had also held the Intergovernmental Cooperation Act inapplicable to the Postal Service; but that this was not the basis for the Circuit Court's disapproval is clearly reflected in the final paragraph of its decision, wherein the references are expressly to environmental impacts.

these circumstances, it can hardly be claimed that there was a lesser involvement of "other Federal agencies" here than in Thousand Oaks.

Judge Ward also cited in his opinion to Maryland National Capital Park and Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973), and noted that that decision, while not dispositive of the question, buttressed the conclusion that the Postal Service is not exempt from NEPA. In that action, the Postal Service had again set out to construct a new postal facility -- the Washington Bulk Mail Center -- without preparing a detailed EIS under NEPA. The Maryland Commission sued for an injunction, claiming that a full impact statement was required. The District Court disagreed and dismissed the action. On appeal, however, the Circuit Court reversed and directed the lower court to reconsider whether the problems of water and oil run-off at the new facility were not of such magnitude as to require a full-scale EIS. In this eonnection, the Court did not directly address the question of whether NEPA applied to the Postal Service; however, the lengthy discussion of the Postal Service's obligations under NEPA and the terms of its remand to the District Court clearly evidenced the Circuit Court's belief that the Postal Service was subject to NEPA.

In its Brief [p. 23], the Postal Service accords only the briefest attention to the Maryland National case,

asserting as some kind of definitive observation that it did not raise 39 U.S.C. §410 in that action because of the involvement of the Corps in the construction of the Center. However, even if this is so, the fact is that by its decision, the Circuit Court concluded that NEPA applied to the Postal Service -- the only question being whether a full EIS was required. Furthermore, while the Court itself never even mentioned, much less relied upon, the involvement of the Corps, if that had anything to do with the holding -- or the Postal Service's decision not to argue the point -- the same result should follow here; for as we have already noted, the Corps likewise had a major involvement in the instant case.

B. NEPA Itself Calls for Its Application to the Postal Service, and 39 U.S.C. §410 Does Not Provide an Exemption

After analyzing applicable precedent, the District Court addressed itself to the specific language of NEPA and Section 410 and, reading them in conjunction and context, concluded that the Postal Service was not exempt from NEPA's requirements. In this connection, the Court began by inquiring into the purposes of NEPA and properly found that the statute, by its own terms, is of the broadest application. Sections 2 and 101 [42 U.S.C. §§4321 and 4331] commit the Federal government to a national policy "which will encourage productive and enjoyable harmony between man and his environment" and declare it is the continuing policy of the

Federal Government to use all practical means "to create and maintain conditions under which man and nature can exist in productive harmony".

NEPA then goes on to state in Section 102 [42 U.S.C. §4332] that:

> "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall [meet various obligations under NEPA]." (Emphasis added).

The foregoing directives, with the mandate that they be carried forward "to the fullest extent possible", are not inherently flexible, but as noted in the case of Calvert Cliffs' Coordinating Committee v. AEC [449 F.2d 1109, 1114-15 (D.C. Cir. 1971], enact a strict standard of compliance. And, as the District Court noted, the statute "makes environmental protection a part of the mandate of every federal agency and department". [Opinion, Exh. MM, p.10, citing Calvert Cliffs']. Further, the Council of Environmental Quality has, as the District Court observed, lent added emphasis to this language, noting in its Guidelines that every Federal agency "shall comply with [NEPA's procedural and other mandates] unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." [40 CFR §1500.4 (1974); Opinion, Exh. MM, p. 11].

In light of the broad mandate of NEPA (acknowledged in the Appellants' Brief, p. 17), the Court below properly concluded that only the most specific exempting language could free the Postal Service from compliance with the statute; for otherwise, the mandate that all laws of the United States be interpreted in accordance with the policies of NEPA "to the fullest extent possible" would be without meaning. The Court then found that 39 U.S.C. §410 did not provide such an exemption, either in its language or in its legislative history.

As a general proposition, the District Court could have started with the standard rule that exceptions to statutory requirements -- and especially those as far reaching and important as NEPA -- are to be strictly construed [Spokane and Inland Empire Railroad Co. v. U.S., 241 U.S. 344 (1916); Hartford Electric Light Co. v. FPC, 131 F.2d 953, 962 (2d Cir. 1942); Anderson v. Manhattan Lighterage Corporation, 148 F.2d 971 (2d Cir. 1945). There is nothing in 39 U.S.C. §410 providing such a specific exception to NEPA, nor does NEPA itself in any way suggest an exclusion. To the contrary, the language, as noted, is exactly to the opposite effect.

The District Court did not, however, rely on such a generalized analysis. Instead, Judge Ward addressed himself explicitly to the language of 39 U.S.C. §410, noting at the outset that:

> ". . . the statute does not exempt the Postal Service from all federal laws except those enumerated in §410(b). Rather, it makes inapplicable to the Postal Service only those federal laws 'dealing with public or Federal contracts, property, works, officers, employees, budgets or funds. . . .' 39 U.S.C. §410 (a). These are words of limitation." [Opinion, Exh. MM, p. 12].

This limitation is, as the District Court indicated, critical; for the language of "public and Federal contracts" and the like does not parallel anything in NEPA, and on its face is clearly inapplicable. In this connection, the Court noted that NEPA is a law dealing with environmental protection, not contracts and property as such [Opinion, Exh. MM, p. 12]. Its basic thrust is to establish a national policy for the country concerning the environment, and then to set forth the actions that Federal authorities are to follow in implementing that policy. It is not directed to public contracts or works as such, but rather to actions in general which may impact on the environment. Indeed, "major federal actions" is the key phrase in the central provisions of the Statute [Section 102(2)(C)]; yet in 39 U.S.C. §410, there is no similar phrase -- no mention whatever of laws dealing with "Federal actions" -- though Congress could easily have included this phrase if it were thinking of NEPA or intended the Postal Service to be free of it.* There is, in short, as the District Court held,

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* It is worth noting that there is not a single reference in any section of NEPA to public or federal contracts, property, works, or any other of the identifying categories set out in 39 U.S.C. §410.

"nothing in the language of §410 on its face which prohibits ... makes impossible a broad expression of overriding national policy such as NEPA." [Opinion, Exh. MM, p. 13].

Furthermore, if additional evidence were needed as to the scope of the Section 410(a) exemption, then as the District Court pointed out, it is provided by examination of the subsection (b) exceptions, all of which, like the exemption itself, relate only to statutes dealing with contracts, property, works, employees and funds. [Opinion, Exh. MM, p. 13]. This, we submit, is clear proof of the limited nature of the exemption itself and underscores the fact that Congress had no intention of overriding NEPA when it enacted 39 U.S.C. §410, but, on the contrary, had statutes of a completely different nature in mind. For when the subsection (b) exceptions are taken together, they, like the basic "public and Federal contracts" language, evidence a specific concern with the areas of politics and bureaucratic red-tape that had so burdened the Postal Service over the years, including the inflexibilities of competitive bidding and contract awards, civil service intransigence, multiple layers of budget approval, and requirements of Congressional approval for every new Postal facility and land purchase or sale. These, quite clearly, and the accumulation of overlapping Postal laws, were what Congress unquestionably intended to exempt the Postal Service from when it enacted

39 U.S.C. §410.*

By contrast, if the Section 410 exemption were now read to extend to NEPA, then it would reach to essentially all Federal laws. But if that had been the intent, then Congress could and presumably would have said so directly. Instead, it limited the exemption to laws dealing with Federal contracts and the like, thereby indicating that its intention and goal was to free the Postal Service from its historical, feudal bonds, not to override statutes such as NEPA.

The legislative history cited in the Postal Service's own brief strongly supports the foregoing conclusion. Thus, the quotation from Senate Report 91-912 [91st Cong. 3d Sess. p. 2 (1970)] set out so prominently at p. 24 of the Appellants' Brief refers to "a labyrinth of Postal statutes" enacted "over a 200-year period" as the cause of Post Office inefficiency. NEPA, of

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* The District Court also took note of the portion of Section 410 exempting the Postal Service from application of the Administrative Procedure Act [5 U.S.C. §500 et seq.] and suggested that under normal rules of statutory construction, the specific reference to this one statute of general application would preclude the inclusions of others of general applicability. In its Brief, the Postal Service points out that the APA itself requires a specific reference to override it and suggests from this that if the APA is included in the exemption, "NEPA is also included". But this does not follow. For when Congress included the APA, it could have, but did not go on to include other statutes of similar kind; and when it did not, it can hardly be deemed to have intended an exemption from NEPA. Furthermore, there were strong reasons for exempting the Postal Service from the APA since otherwise its management would have been subject to the same red tape in personnel matters and business judgments that it was manifestly the purpose of Section 410 to remove.

course, is not a "postal" statute, and it certainly was not associated with the layers of legislation derived from the past, since it was only enacted by Congress five months before the Senate Report was issued. Congress did not mention NEPA, we submit, because it never conceived the exempting language to apply to the newly enacted law setting a national policy for the environment. Rather, as the District Court noted in rejecting the Postal Service's identical arguments below, the legislative history "evinces concern only with removing the Postal Service from partisan politics, reorganizing its management and financial structure, and providing [wage] parity. . . ." [Opinion, Exh. MM, p. 14].

Nor is there anything in the case law to support the position of the Postal Service that it should be exempt from NEPA. In this connection, the single case cited by the Service in support of its claimed exemption -- Cohen v. Price Commission, 377 F.Supp. 1236 (S.D.N.Y. 1972) -- was properly distinguished by the court below [Opinion, Exh. MM, p. 15]. There, the claim was made that the Federal Price Commission had violated the law when it allowed increased subway fares to take effect in New York City without preparing an environmental impact statement. Judge Weinfeld denied plaintiff's motion for a preliminary injunction, concluding that NEPA was not applicable to the Price Commission because that agency

was a temporary agency designed to act quickly, while NEPA stressed long-range environmental policies. That is not, however, the case with the Postal Service. Rather, as the District Court stated, the Service "is a permanent establishment engaged in long range planning and action in almost every populated area in the country" and thus exactly the type of entity to which NEPA has the greatest meaning.* On this basis, the Court properly concluded that the Cohen case is not applicable precedent here and that NEPA does apply to the Postal Service [Opinion, Exh. MM. p. 18].

As one final point, we note that while it professes to operate in a businesslike way, the Postal Service has run up huge deficits in essentially every year since it was reorganized, with the United States taxpayers having to fill the gap through Congressional appropriations. Indeed, this past year alone, more than $400,000,000 was provided to the Postal Service from tax revenues to make up its losses. Under the foregoing circumstances, we suggest that whatever 39 U.S.C. §410 might otherwise be deemed to cover, the continuing Federal support for the Postal Service invests it with an inherent Federal involvement requiring compliance with NEPA in this case.

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*Judge Weinfeld had made the same distinction in his opinion, when comparing the Price Commission to agencies such as the FPC and AEC [see 337 F. Supp. at 1242].

C. Other Points Raised by the Postal Service in its Brief are Without Merit

The Postal Service, perhaps recognizing the weaknesses of its legal arguments, ends up asking this Court to exempt it from NEPA on policy grounds [Appellants' Brief, pp. 33-35]. Thus, it laments the delay and purported cost increases that the application of NEPA would entail, and also suggests that if NEPA is held applicable to its operations, countless other laws may be as well.

These arguments would, of course, better be addressed to Congress; but there are other reasons why they are particularly inappropriate here. The Service's concern over delay, for example, and increased costs, has little relevance in light of its own regulations (Appellants' Brief, pp. 17-19), which expressly contemplate that impact statements will be prepared and circulated [39 CFR §775.1 et seq.]. Indeed, an EIS was prepared for the VMF and, if it had been done correctly and in good faith, the Postal Service would not have been slowed. Furthermore, the courts have consistently held that delay cannot be used to justify noncompliance with NEPA [Calvert Cliffs, supra, at 1115; see also: Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972)].

Similarly, the contention that forcing the Postal Service to comply with NEPA would open the floodgates to the application of many other statutes can be accorded little weight.

There is, in the first instance, no showing that any of the cited statutes have any connection with actual or potential Postal Service activities. Beyond this, there is no showing that Congress considered any of these statutes to be of such fundamental importance that other laws must be interpreted and administered in accordance with them, as is the case with NEPA. Lastly, even if other laws may be applicable to the Postal Service, this is without relevance; for the policies and directives of NEPA stand on their own and above perhaps any other; for they go to the heart of a decent environment and the natural heritage of this Nation.

Finally, we deem it important to note that up until the moment when it was served with process in this lawsuit, the Postal Service acted as though it was bound by NEPA, and its own administrative practice accordingly suggests that NEPA applies to it. Thus from the outset, the Postal Service directed and agreed to the preparation of an impact statement as "required by NEPA" (Appellants' Brief, p. 11), and as late as July 1974, when the Service responded to plaintiffs' demand letter, it asserted its compliance with NEPA, not its exemption. Rather, it was only when faced with an actual suit that the Postal Service raised for the first time the claim that it is not now, and never was, subject to NEPA, and thus could not have violated the law. We submit, however, that the Service was better informed at the outset, and that the District Court was correct when it held NEPA applicable to the Postal Service and the Chelsea Garage.

POINT TWO

THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE EIS FOR THE VMF DID NOT MEET THE REQUIREMENTS OF NEPA

The principal purpose of NEPA is to insure that all Federal agencies contemplating major Federal action will take environmental values into account in reaching their decisions. In this respect, the procedural mandates of NEPA -- those measures designed to ensure that such environmental values are properly taken into account and ultimately weighed in the balance -- are rigorous and "establish a strict standard of compliance" [Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109, 1112-15 (D.C. Cir. 1971)] which must be "followed scrupulously" [Conservation Society of Southern Vermont v. Secretary of Transportation, _____ F.2d _____, 7 ERC 1236, 1241 (2d Cir. 1974)]. In particular, as the court in Calvert Cliffs' stated, "if [a] decision [is] reached procedurally without individualized consideration and balancing of environmental factors -- conducted fully and in good faith -- it is the responsibility of the courts to reverse." [449 F.2d at 1115].

The District Court recognized and applied these same standards in the instant case, noting that "NEPA requires a careful and informed decisionmaking process and [that] its procedural requirements must be strictly complied with."

[Opinion, Exh. MM, p. 28]. The Court then concluded that the Postal Service "had failed to comply with these procedural requirements". [Ibid.] In this connection, the Court placed principal emphasis on the failings of the EIS (which lies, of course, at the heart of the careful and individualized consideration required by NEPA). Thus Judge Ward noted that in its NEPA analysis, the EIS had used the air rights housing above the Garage as a principal benefit and justification for the VMF, but had not described or taken into account the resulting environmental impacts. Similarly, though the housing had been used as a major selling point for the Garage, there was no disclosure of the very real possibility that it might never be built. In addition, the Court found that the discussion of alternatives was inadequate [Opinion, Exh. MM, pp. 15-28].

The Postal Service argues on appeal that the District Court was mistaken in its conclusions. The failure to disclose the uncertainty of the housing was no basis, it contends, for enjoining the VMF; nor, despite the use of the housing to justify the Garage, was there any need to consider the resulting negative impacts. Instead, the Postal Service would now turn its back on what its EIS described as the primary benefit of the VMF and treat the housing as if it had nothing to do with the Garage. Were such an approach accepted, the EIS would still be defective for failure to disclose adequately

all relevant impacts and to discuss alternatives meaningfully. But beyond that, the belated and artificial separation of the Garage and the housing has no basis in fact or in law. This point and others are discussed below.

A. The Postal Service is Far Off Base in its Assertion that the EIS is Adequate for the VMF Alone

In its opinion, the District Court took note at the outset that the EIS used the housing project as a primary justification for building the VMF and rejecting other alternatives, but never bothered to assess the resulting environmental impacts of the housing. This, the Court said, the Postal Service sought to justify on the grounds, among others, that the housing was too speculative and tentative to require detailed analysis at this time. But this justification, in turn, served simply to reveal a further defect. As the District Court put it:

> "Defendants' argument that the housing component is too speculative and remote to require an analysis of its environmental impact, at this time, reveals a significant omission in the EIS -- the failure to mention the possibility that the housing may never be built." [Opinion, Exh. MM, p. 16].

The Postal Service does not and, indeed, cannot offer direct rebuttal to the Court's observation; for its own papers in this case, including its current Brief, are

replete with statements as to the uncertainty of the housing, and there is no doubt that the EIS does not deal meaningfully with this.* Instead, the Postal Service attempts to make a silk purse out of a sow's ear by taking a roundabout approach. The omission, it claims, is without significance because the District Court found no error in the analysis of the VMF's direct impacts, and the construction of the Garage without the housing would therefore make no difference [Appellants' Brief, pp. 37-38].

The Postal Service's position is untenable for several reasons:

First, contrary to the implications, if not affirmative misstatements contained in the Postal Service Brief, the District Court did not reject plaintiffs' claims that the EIS dealt inadequately with the air pollution and noise impacts of the VMF or find "no error" in the EIS evaluation of such impacts. In this connection, as has already been noted,

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* Rather than dealing openly with the uncertainties, the EIS actually gave an impression of assurance. Thus at p. II-28, the EIS indicated that HDA had already committed funds for the housing. This proved to be erroneous, and at p. VIII-4, the EIS purported to correct the mistake. But the original observation was never removed from the EIS, and the substantial paragraph clearly gives the impression that the necessary HUD funding, upon which HDA funding depends, will be forthcoming. Far from a meaningful discussion of remoteness, this paragraph reads as a reassurance that the housing towers will be funded and constructed -- an impression that pervades the entire EIS and yet, as the Postal Service so vehemently contends now, may be unfounded.

plaintiffs had submitted to the Court below expert affidavits and a detailed study prepared for the City's Community Planning Board No. 4 which indicated, contrary to the impression given by the EIS, that the VMF traffic would contribute to frequent and widespread violations of the national standards for carbon monoxide and other pollutants [Exh. X-1, p. 10-11]. Similarly, the same study indicated that the noise impacts of the VMF traffic had not been assessed in an adequate matter. The Court, however, did not reach these questions, nor did it have to; and as heretofore noted, counsel had earlier agreed that an evidentiary hearing on these issues would not be requested or held if the Court was able to decide the pending motions on other grounds. This is, of course, exactly what happened; and for the Postal Service now to say that the Court did not uphold plaintiffs' claims or find inadequacies in the EIS -- when its counsel knew the questions were never reached -- is ingenuous, if not lacking in candor.

Second, the District Court, further on in its opinion, did clearly determine that the EIS did not adequately evaluate alternatives to construction of the VMF. This failing, which is discussed in greater detail at pp. 47-53 of this Brief, is a failing in the EIS relating directly to the garage component of the project -- but one which the Postal Service conveniently forgets.

Third, and most importantly, the position of the Postal Service ignores the basic and underlying fact that whatever the consideration of impacts, in describing the costs and benefits of building the VMF, the EIS used the housing component as a principal justification for, and benefit resulting from, the Garage itself; and in the balancing process and comparison of alternatives, this was unquestionably a decisive factor [see Opinion, Exh. MM, p. 15]. If, therefore, the housing is dropped out, as the Postal Service posits in its argument, the earlier cost-benefit analysis reflected in the EIS becomes meaningless since the major benefit would be gone; and a new EIS would thus be necessary even if the direct impacts of the VMF had been adequately assessed. As the District Court put it:

> "NEPA's requirement of a detailed impact statement 'seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and cost-benefit balance.' Calvert Cliffs, supra, at 1114. Certainly the real possibility of the VMF standing without the housing would alter the environmental impact and the cost-benefit analysis." [Opinion, Exh. MM, pp. 17-18].

Finally, insofar as the Postal Service contends that it was justified in including the benefits of the housing as a principal advantage of the VMF [Appellants' Brief, pp. 39-40], it is enough to say that the reasons given argue just

as strongly for including the costs -- a subject to which we now turn.

B. The Postal Service Improperly Used the Housing as Justification for the VMF Without Considering the Resulting Environmental Impacts and in a Fashion that May Render Environmentally Satisfactory Housing Impossible

There is no question, nor does the Postal Service deny, that, as the District Court noted:

> ". . . throughout the EIS, the housing project [was] cited as one of the primary benefits to be derived from the construction of the VMF. It was a major factor in the rejection of other alternatives." [Opinion, Exh. MM, p. 15](Footnotes omitted).

As stated in the EIS, in the section entitled "Assessment of Trade-Offs":

> "It is the conclusion of this statement that the net effect of the project development is positive, as it represents an improvement of Postal Service operations as well as a much needed source of low and moderate income housing for the Chelsea-Clinton community." [EIS, p. III-36].

In other paragraphs, the statements of benefits were even stronger. Thus in the EIS summary, the "most significant impact of the Garage project was described as "the positive response to a pressing and obvious need for low and moderate income housing in the area." [EIS, p. 3](Emphasis added). In the trade-offs section, the "beneficial consequences" of the project were described as including "most importantly . . .

a response to a pressing local housing need." [EIS, p. III-35] (Emphasis added). And in the summary of alternatives, the VMF was described as "the most advantageous to the community in providing a needed potential source of housing." [EIS, p. 4].

From the foregoing, it is apparent that the housing was treated in the NEPA analysis as the principal justification for imposing the VMF and its indignities on the Chelsea residential community. However, while the benefits were weighed in the NEPA balance, the environmental impacts of the housing -- including resulting congestion, pollution and the problems that can be created by excessive densities, cramped dwelling units and isolated open spaces removed from the community by 80-foot walls -- were not taken into account or subject to the analysis that NEPA requires*. This was clearly improper, and the District Court so held, noting that "throughout the EIS, the VMF and the housing had been described as one project . . . and presented to the public in that fashion", and then concluding:

> "The Postal Service, having used the housing as a major justification for the VMF and as a principal benefit to be derived therefrom, cannot now eschew its responsibility for fully disclosing and evaluating the environmental impact of the combined project. Cf., Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013 (5th Cir. 1971), cert. denied, 406 U.S. 933 (1972)." [Opinion, Exh. MM, p. 23].

* The Department of Housing and Urban Development stated expressly in its comment letter that there was no environmental clearance for the housing [EIS, Attachment A, Letter of February 8, 1974].

The disclosure of the environmental costs of the housing towers in the EIS would not have been a mere academic exercise. The alleged benefit to flow from the housing towers was the main selling point of the project to the Chelsea-Clinton community and its political leaders. In addition, the decision-makers in the Postal Service itself, in assessing the whole project and determining its viability utilized costs and benefits skewed in favor of the project. Without a complete analysis before them, the Postal Service decisionmakers and Congress might well have reached a different conclusion about the desirability of the project.

Furthermore, in very tangible terms, full consideration of the negative impacts could have revealed critical deficiencies in the combined Garage-housing complex. For example, experience in public housing projects has shown that isolated open spaces can be such a breeding space for crime as to make the housing itself non-viable or at least extremely dangerous. In the instant case, the open spaces for the housing would be totally isolated from the surrounding community, since they would be perched on top of the Garage, 80 feet above the sidewalks and streets. With this isolation, the environment could well be hostile. Yet, as the District Court noted,

> ". . . nowhere does the EIS give meaningful consideration to the problems posed by such high density dwellings, containing large open space, completely isolated from the surrounding environment. See, e.g., J. Jacobs, The Death & Life of Great American Cities (1961). These are problems which will affect both the project residents and the Chelsea neighborhood in general. For example, crime and crime control are problems which have an environmental impact which must be considered in detail. See Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973). 42 U.S.C. §4332(A) requires that the Postal Service take an interdisciplinary approach using the social sciences in decision-making of the sort here contemplated. Such an approach is lacking in the EIS prepared by the Postal Service and renders it inadequate." [Opinion, Exh. MM, p. 25].

Similarly, the EIS did not address itself to other environmental impacts that would follow from the housing and the demands it would impose on top of the VMF's. For example, the District Court noted,

> ". . . a housing complex of this size will require supporting services such as maintenance, garbage disposal, fuel deliveries and other commercial services attendant upon residential usage. The generation of this sort of traffic is nowhere considered. Much of this will be additional truck traffic. The resultant noise and air pollution is not considered, nor is the effect such traffic will have on the operations of the VMF"[Opinion, Exh. MM, p. 24].

Furthermore, the EIS did not accurately assess the impacts of cars owned by the apartment dwellers, having assumed off-street parking [EIS, p. III-2 to 4; B-10 to 12] when, by the Postal Service's own later statement, there will be none [Exh. U, ¶2]. This complete lack of parking facilities for 1500 residents

will unquestionably lead to heavy congestion on the streets surrounding the VMF; yet the EIS never addressed the problem, and in its air pollution analysis, assumed that the surrounding streets would be uncongested and illegal parking actually reduced [e.g., EIS, pp. III-5 to 7, III-36].

The fact is, of course, that the housing impacts could not help but be additive to those of the Garage, and the failure of the Postal Service to assess these was, as the District Court found, in violation of the Service's obligations under NEPA. Thus Section 102 directs agencies "to the fullest extent possible" to prepare "detailed statements" discussing the environmental impact of a proposed action and "any adverse environmental effects which cannot be avoided". The Guidelines issued pursuant to NEPA* demand that impact statements cover the "probable impact of the proposed action on the environment" and add that "[t]his requires agencies to assess the positive and negative effects of the proposed action." [40 CFR §1500.8(a)(3)](Emphasis added). Moreover, the courts have interpreted NEPA to require a full disclosure of environmental impacts in the EIS. [See, e.g., EDF v. Corps of Engineers, 325 F.Supp. 728 (E.D. Ark. 1971); Monroe County Conservation Council v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972); Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir. 1973);

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* Council on Environmental Quality ("CEQ") Guidelines for the Preparation of Environmental Impact Statements ("CEQ Guidelines"), 40 CFR §§1500.1 et seq., 38 FR at 20550 et seq. (August 1, 1973).

Atchison, Topeka and Santa Fe v. Callaway, 382 F.Supp. 610, 623 (D.D.C. 1974)]. This clearly was not done in the instant case.

Of equal importance, as the District Court held, the failure to undertake a full NEPA evaluation of the housing in conjunction with the NEPA assessment of the VMF was in error, since it is clear that NEPA 'requires that agencies of the Federal government consider the impact of an overall program and not just isolated aspects of facilities.'" [Opinion, Exh. MM, at p. 19, citing Atchinson, Topeka and Santa Fe v. Callaway, supra, at 620; to the same effect, and also cited by the Court, Conservation Society of Southern Vermont v. Secretary of Transportation, supra; Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973); Scientists' Institute for Public Information v. AEC, 481 F.2d 1079 (D.C. Cir. 1973); and Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972), cert. denied, 409 U.S. 849 (1972)]. In this connection, as the District Court noted, the housing and the Garage were consistently treated in the EIS as a single total project, with the benefits of the housing counted as benefits of the Garage; and once this was done, the NEPA analysis of the entire project could not properly be segmented [see Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, supra, at 1023]. Nor should they have been since, as the EIS itself revealed, the requirements of the

VMF necessarily imposed constraints on housing at the same site which could render it environmentally unacceptable.* Beyond this, the two components are not separable in reality. Both will generate traffic, both will result in added pollution, both will add noise -- and all in the same area. Under these circumstances, the failure to evaluate the Garage and housing together was patently improper, and the District Court was correct in so holding.

C. The Appellants' Counter-Arguments Are Not Well Taken

The Postal Service argues vigorously that the District Court erred in finding the EIS deficient because of its failure to assess the impacts of the housing. Despite the fact that the EIS treated the two components as a whole, the Service now claims that the two are not integrally related and that the segmenting of environmental analyses was and is permissible here. Further, the Postal Service claims that the District Court committed reversible error when it concluded, in the face of

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* By way of specific example, the layout for the housing, as set forth in the EIS, is admittedly dictated in substantial part by the structural design of the Garage [EIS, p. VIII-3 and 4]. A comprehensive evaluation of this layout might well show, however, that the layout itself is environmentally poor -- as, for example, requiring excessive tower heights or, as already noted, generating isolated open space. Yet optional layouts were not and could not be considered due to the presumption that the Garage would be built -- and built in a particular way; and if construction is now allowed to proceed, the alternative possibilities may be lost forever. If a NEPA evaluation of the housing had been undertaken, these options would, of course, have been considered by now.

purportedly conflicting positions, that the design and construction of the VMF Garage determine, in significant part, the configuration of the housing above it [Appellants' Brief, pp. 41-42].

Taking the last point first, even if the District Court had made a finding on its own as the Postal Service asserts, this would be of little relevance. For whatever the physical interdependency may (or may not) be, the fact is, as the Postal Service cannot deny, that the EIS consistently treated the housing and the Garage as a single, integrated project [EIS, pp. 1; I-1 to I-5; and see p. 7 of this brief, supra]. Having taken this approach, and especially after using the housing as a prime benefit of the Garage, the Postal Service is in no position to claim that the two components should not have been assessed together [see Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department supra, at 1023].

Furthermore, the District Court did not make an improper finding in the face of contested facts. To the contrary, the conclusions as to physical interdependencies and the constraints placed by the Garage are the conclusions of the EIS which, aside from referring to the "structurally integrated VMF-housing project", also explicitly stated that:

> "The configuration of the housing component of the project -- that is, high-rise apartment towers on the avenues and low-rise units mid block -- has been dictated largely by the interior spatial and circulatory requirements of the VMF." [EIS, p. VIII-3].

For the Postal Service now to claim otherwise simply suggests still a further deficiency in the EIS*.

The Postal Service also contends, as it did before the District Court, that the housing is too remote and speculative to require a NEPA evaluation at this point, noting among other things, that an application for Federal funding for the housing has not yet been filed. However, if this was or is so, then the Postal Service should not have used the housing as a principal benefit of and a basic justification for the VMF. Furthermore, contrary to the Postal Service's claims, the absence of final design plans or absolute certainty in respect of the housing created no bar to meaningful evaluation. The resulting pollution, for example, could certainly have been assessed in closely-approximate terms based on the number of projected apartment units and the breakdown of apartment types, and the

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* It should also be noted that, contrary to the Postal Service's assertions in its Brief, the affidavit of its own architect clearly indicated the structural interdependency of the housing and the Garage, stating explicitly that the bid documents for the VMF included "columns, duct shafts and foundations for a specific high-rise apartment tower complex." [Exh. E]. Not general, but specific -- as obviously has to be the case; and this comports precisely with what the EIS said. Thus, though the Postal Service claimed in its 9(g) statement that there was continuing flexibility, the undisputed facts, including the EIS, showed that there were real restraints as well.

basic problems of the housing environment, including the justification for a design leaving large, isolated open spaces and the potential of such areas for encouraging crime, could have been considered.

As the District Court properly held, one of the principal purposes of NEPA is "to consider long-range effects and examine environmental consequences before there are 'irreversible and irretrievable commitments of resources'". [Opinion, Exh. MM, p. 20, citing Conservation Society of Southern Vermont v. Secretary of Transportation, 362 F.Supp. 627 (D.Vt. 1973), aff'd _____ F.2d _____ (2d Cir., Dec. 11, 1974)]; and to this end, it noted, the CEQ Guidelines direct the evaluation of impacts "beginning at the earliest possible point". [Opinion, Exh. MM, pp. 20-21]. Under these directives, as well as the controlling case law previously cited, and in view of the restraints that the Garage cannot help but impose on the housing (if only to foreclose the option of building at grade level), the District Court was eminently correct in holding that a NEPA evaluation of the housing is required now and cannot properly be segmented from the evaluation of the VMF Garage [Opinion, Exh. MM, p. 21, and cases cited at p. 42, supra].*

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* Bartunek v. Patterson, _____ F.Supp. _____ (N.D. Ohio, 1974), annexed to the Appellants' Brief and discussed at p. 47, is completely inapposite. In that case, a complaint against EPA was dismissed as premature because there was, as yet, no Federal involvement of any kind. Here, by contrast, the Postal Service is already deeply involved, and it is the one that has used the housing to justify the VMF and described it as integrally related.

Nor, contrary to the Postal Service's claims (Brief, pp. 44, 46), is there any need to delay the VMF pending a formal application or the actual commitment of funds for the housing. What is rather required is an evaluation of the probable environmental impacts and the reasonable alternative approaches now; and as already noted, this does not depend on final detailed designs. Furthermore, as the District Court noted, through the "lead agency approach", the necessary analyses of the housing and Garage can both be accomplished now. [Opinion, Exh. MM, pp. 21-22]. The Postal Service's failing is, in part, that it did not even try.

The Postal Service next argues that the segmentation of the housing and Garage components is justified, if not required, by Congressional mandate, and that separate environmental evaluations are appropriate because of the asserted "independent utility" of the VMF. With respect to the first of these claims, it is sufficient to note that the statute to which the Postal Service refers -- P.L. 92-313 -- did not and does not divide the Chelsea project into two parts or mandate segmentation in any respect. All that statute does is <u>authorize</u> the conveyance of air rights for the housing and, in fact, it does not even give approval to the VMF as such. Indeed, far from dividing the two elements of the project, the statute recognized their structural interdependence by requiring design and construction of the Garage to be done in such a manner as to allow the building of the housing.

As to the claim of independent utility, and really coming full circle, the fundamental fact remains that the Postal Service did not treat the housing and Garage components as independent, but plainly recognized their interrelationship throughout the EIS, including when it included the benefits of the housing in weighing whether the Garage should go forward. That being the case, the Postal Service cannot uphold the EIS and its NEPA evaluation on the ground that the VMF may have an independent utility, since the evaluation was never undertaken on this basis.

Furthermore, the cases that the Postal Service offers to justify segmentation of the VMF-housing project (Appellants' Brief, p. 50) are clearly inapposite. Sierra Club v. Callaway, 449 F.2d 982 (5th Cir. 1974), Sierra Club v. Stamm, 507 F.2d 778 (10th Cir. 1974) and EDF v. Armstrong, 352 F.Supp. 50 (N.D. Cal. 1972), all involve huge multifaceted projects, the components of which are geographically separated and the construction of which is spread out over decades. Moreover, in none of them, or in any other of the cited cases, were the benefits of an assertedly separate segment used to justify the project at hand as was the case here.

In comparison, using the test laid out in one of the very decisions cited by the Postal Service, the District Court explained why segmentation in the instant case was not permissible:

> "In Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974), cited by defendants, the court considered the following factors relevant to the determination of whether a portion of a project could be segmented for NEPA purposes: the scope of the entire project, the timing of the construction of the various elements of the project and the interdependence of the components of the project. Considering each of these criteria the defendants' argument must fail. First, the scope of the project is small -- one square block. Indeed, both components of the project will occupy the same square footage. As envisaged in the EIS, construction is to be consecutive, or as nearly consecutive as possible. Most important, however, as previously noted, the two projects are structurally interdependent" [Opinion, Exh. MM, pp. 23-24].

In a final effort to justify its selective treatment of the housing, the Postal Service suggests that enough was said about the impacts to uphold the validity of the EIS (Brief, pp. 52-53). In this regard, however, the Postal Service is forced to concede that the EIS analysis of impacts is not complete, and as the District Court found, there was no meaningful consideration at all in the areas of safety and crime, and the impacts of housing-related vehicular traffic [Opinion, Exh. MM, pp. 24-25]. Moreover, a review of the EIS sections cited in the Postal Service Brief indicates the totally inadequate nature of the "evaluation", with not the slightest discussion of design alternatives, including the pros and cons of larger versus smaller structures, of reduced number of apartments, of layouts avoiding isolated open spaces or anything along these lines. Similarly, in one of the sections supposedly dealing with the

social environment, only one short paragraph is devoted to possible negative impacts of high density housing, and all that follows from this is the observation that "project [housing] design should reflect the emerging body of research to the extent practicable." [EIS, p. III-31]. However, with the VMF itself enforcing serious design constraints, the "extent practicable" could be nothing at all -- and that is exactly why the issue should have been faced in the Garage EIS. Furthermore, since it is all too likely that the problems could not be eliminated given the VMF design, the impacts should have been weighed at this time, rather than being left for the future. But again, while the benefits were counted, the impacts were left out of the assessment of trade-offs.

The District Court was clearly correct when it held that such an approach did not meet the requirements of NEPA.

D. The Postal Service Failed to Deal Adequately with Alternatives

The District Court concluded that the EIS was defective not only in its failure to consider all relevant environmental impacts, but also in its treatment of alternatives. Quoting extensively from the Court's decision in Monroe County Conservation Council v. Volpe, supra, at 697-98, the District Court emphasized that the "requirement for a thorough study and detailed description of alternatives . . . is the linchpin of the entire impact

statement", and that "passing mention of possible alternatives . . . in a conclusory and uninformative manner" will not do. The EIS must provide information sufficient to support the conclusions drawn [Monroe County Conservation Council v. Volpe, supra; Silva v. Lynn, supra, at 1286-87; Atchison, Topeka and Santa Fe Railway Co. v. Callaway, supra, at 623; I-291 Why? Association v. Burns, 372 F.Supp. 223, 247-53 (D. Conn. 1974)]; and while the discussion of alternatives need not be exhaustive, what is required, as the District Court observed, is "information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned." [Opinion, Exh. MM, p. 27, citing NRDC v. Morton, 485 F.2d 827, 836 (D.C. Cir 1972)].

Applying these standards, the District Court found the Postal Service's treatment of alternatives, which amounted to only five and one-half pages in the main text of the EIS, inadequate. The Court focused on the treatment of two alternatives, "no action" and "scatter sites", stating that "'passing mention' in a 'conclusory and uninformative manner' precisely describes the discussion. . . of each." [Opinion, Exh. MM, p. 26]. In this respect, the Court was clearly correct. There are only two paragraphs in the EIS dealing with the no action alternative, one about the "reduced level of operational efficiency" absent consolidation at the VMF and the other raising the spectre of no housing at the site if the VMF is not built [EIS, p. V-1].

But no supporting data is presented regarding the operational efficiency, and as for the housing, the Postal Service itself now asserts that it is speculative and remote. Similarly, the EIS dismisses the "scattered site" alternative by citing the purported need for a larger total fleet of vehicles to operate with such an alternate, and the alleged "economics of scale" associated with the use of the VMF [EIS, p. V-2]. Again, however, no data are presented in support of these conclusions, nor is anything said about the great savings in construction costs and possible reductions in pollution that might result from the elimination of the VMF.

The inadequacies of the discussion in the EIS are only underscored by the Appellants' Brief to this Court, wherein historical studies, submitted under affidavit to the Court below, are cited as evidencing the need for a consolidated site. Perhaps they do -- though this has not been tested; but the critical fact is that they were never included or cited in the EIS and thus were never circulated to other agencies or before the public as a part of the NEPA process. As the court said in NRDC v. Morton, supra:

> "The subject of environmental impact is too important to relegate either to implication or to subsequent justification by counsel. The statement must set forth the material contemplated by Congress in form suitable for the enlightenment of the others concerned." [458 F.2d at 836].

The Postal Service asserts that the District Court's conclusion of inadequacy was based solely on its finding that there would be a 580 mile increase in distances travelled for trucks now stationed at the Leroy Garage, and argues that the Court's use of this figure was mistaken (Appellants' Brief, pp. 55-56). This is simply not so. The District Court made it perfectly clear that the treatment of the "no action" and "scatter site" alternatives was inadequate because of its conclusory and non-informative nature and complete failure to provide supporting information -- shortcomings that are obvious from the face of the EIS [Opinion, Exh. MM, p. 26]. As to the Leroy Street facility, contrary to the Postal Service's claim that the Court misunderstood the situation, Judge Ward's language clearly indicates his awareness that the 580 mile figure related only to the Leroy Garage. But this significant result from removing one facility quite properly led the Court to skepticism about eliminating it at the least -- yet the EIS provided no answers. Furthermore, as is evident from the EIS, traffic from the Leroy Street facility is traffic that must pass through residential areas, whereas this is not the case with other scattered site facilities [EIS, Fig. I-4]; but again the EIS never took note of this fact.*

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* Similarly, while the Postal Service asserts in its Brief that the VMF would reduce CO emission, it does not bother to point out that even if this were so, the reduction would occur where people do not live. Moreover, the Brief fails to note what the EIS itself acknowledges -- that the VMF would increase concentrations of other pollutants, including hydrocarbons and nitrous oxides [EIS, Table III-4].

In light of the foregoing, the District Court properly concluded that the EIS was defective in its treatment of alternatives -- and it could have gone further, we believe. Specifically, the EIS failed to mention altogether the Yale Express alternative which, as plaintiffs had noted in their July 1974 letter to the Postal Service [Exh. DD], offered the possibility of equivalent facilities to the VMF's, but in an industrial rather than residential area, and with very substantial potential cost savings. In addition, the EIS failed to include any analysis of dollar costs as a part of the cost-benefit balancing.

This failure to consider costs was not of minor importance, where, as here, several alternatives, including scattered site facilities would, on the face of things, appear to involve the potential for lesser outlays. To the contrary, NEPA itself, as interpreted by the courts, looks to a cost-benefit balance in which economics are one element of the formula. As stated in Calvert Cliffs', supra:

> "'Environmental amenities' will often be in conflict with 'economic and technical' considerations. To 'consider' the former 'along with' the latter must involve a balancing process. In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and 'systematic' balancing analysis in each instance" [449 F.2d at 1113]. Accord Montgomery v. Ellis, 364 F.Supp. 517 (N.D. Ala. 1973).

And within this Circuit, Judge Oakes held in Conservation Society v. Secretary, supra, that an EIS prepared for a highway

did not contain a sufficient weighing of costs and benefits where "no attempt [was made] to place a dollar figure on economic and environmental harm and benefit caused by the highway."

Under the authority of the cases cited above, the EIS for the Chelsea Garage -- which did not even mention dollar costs, much less attempt to assign them -- was deficient; and the deficiencies were all the greater in light of the Postal Service's own NEPA regulations which require impact statements to include an "analysis of . . . alternatives [that may avoid one or all of the adverse impacts] and their costs . . . " [39 CFR §775.6(c)(4)], and further explicitly directed that "[t]he economic and environmental costs and benefits of the proposed action must be balanced [in the EIS]." [39 CFR §775.6(c)(7)]. Yet the EIS here did not describe or balance economic costs in any manner whatsoever.

If the EIS had addressed the cost issue, it might well have paid greater attention to the Yale Express facility. Instead, however, it rejected plaintiffs' suggestion out of hand as having come too late to deserve consideration. But as this Court held long ago in Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (1965), cert. denied, 384 U.S. 926 (1966), where a reasonable alternative is presented that has the possibility of eliminating serious environmental harm, an agency cannot close its eyes, but on the contrary, has an affirmative duty to in-

quire whether the public interest would not better be served by it.

If the Postal Service had approached the VMF with such an open mind, it might well have concluded that there were equal or better approaches that could avoid 220 truck trips each day back and forth through Chelsea. But it did not do this, and while the District Court did not reach the Yale Express issue or the inclusion of economic costs, the Postal Service's disregard in these areas simply serves to underscore its inadequate treatment of alternatives.

E. Other Impacts Not Yet Considered

The District Court's opinion points up many of the major failings in the EIS which render it defective under NEPA. We wish to emphasize, however, that these are not the only shortcomings. The treatment of air pollution, for example, where, despite admitted violations of Federally-established standards, the EIS concludes there is not meaningful impact, seem to us fallacious on its face. Similarly, the approach to noise impacts, suggesting that they are acceptable because they will not add too much to already-excessive noise, makes no sense and would appear to conflict with the analyses required by Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972). Nonetheless, since the District Court did not reach the issues, we shall not discuss them here. It is enough to say that in these respects, as well as those addressed by the Court below, the Postal Service did not meet the mandates of NEPA.

POINT THREE

THE APPEAL OF THE POSTAL SERVICE FROM THE DENIAL WITHOUT PREJUDICE OF ITS CLEAN AIR DEFENSES MUST BE DISMISSED. FURTHERMORE, THE DEFENSES ARE NOT SUPPORTABLE.

A. The Postal Service's Clean Air Appeal Should Be Dismissed.

As one of their principal claims in this action, plaintiffs contend that the Postal Service has failed to comply with applicable clean air laws, including the requirements of New York State that an indirect source permit be obtained before construction of the VMF begins. This claim was pressed before the District Court in support of plaintiffs' motion for preliminary injunction, but the Court did not reach the question, addressing only the NEPA issues in its opinion and basing its injunctive order solely on NEPA grounds [Exhs. MM, NN]. Similarly, the Postal Service, in support of its motion to dismiss, argued that the clean air laws and the New York indirect source regulations had no application to the VMF. Again, however, the Court did not pass on these defenses, and in denying the motion to dismiss, did so without prejudice in respect of the clean air issues (Appellants' Brief, p. 58).

Despite the fact that Judge Ward never reached the issues or addressed them in his order, the Postal Service seeks to bring its clean air defenses before this Court and to have them decided as a matter of first instance on appeal. In this connection, it purports to appeal from the District Court's denial

of the motion to dismiss plaintiffs' clean air claims (Appellants' Brief, p. 4).

It is well established, however, that the denial of a motion to dismiss or for summary judgment is a non-final order and thus not appealable [2A Moore, Federal Practice, §12.14 (p. 2338); 6 Moore, Federal Practice, §56.20[2](p. 2745); Drittel v. Friedman, 154 F.2d 653, 654 (2d Cir. 1946); John Hancock Mut. Life Ins. Co. v. Kraft, 200 F.2d 952, 953 (2d Cir. 1953); Sheridan v. Liquor Salesmen's Union, 444 F.2d 393, 394-5 (2d Cir. 1971); and see Pepsico v. FTC, 472 F.2d 179, 185 (2d Cir. 1972)]. Furthermore, even where the denial of the motion to dismiss has been combined with the grant of a preliminary injunction, this Court has limited its review to the portion of the order relating to injunctive relief, and the specific issues underlying the injunction [Drittel v. Friedman, supra; John Hancock Mut. Life Ins. Co. v. Kraft, supra; 9 Moore, Federal Practice, §110.25[1](pp. 272-3)]. In the instant case, injunctive relief was based solely on NEPA grounds, and the clean air issues were not reached either in that connection or in any other. Thus, that portion of the Postal Service's appeal which seeks review of the clean air issues should be dismissed.

In addition, as noted in our motion papers, the facts surrounding the clean air claims are in flux, with revised State regulations having recently been submitted to EPA for approval, and with the State having recently advised the Postal Service that

a permit is required under the new regulations [Exh. R]. These events bear significantly on the Postal Service's defenses and may well end them -- but the lower court has not had a chance to determine their relevance. Thus, the reasons supporting dismissal are even stronger than normal.

If, however, the Court decides to proceed to the merits of the clean air claims, we submit that the failings of the Postal Service are manifest.

B. The Postal Service Has Failed To Comply With Applicable Clean Air Laws

Five years ago, in an effort to bring to an end the increasing contamination of the air, Congress enacted the Clean Air Amendments of 1970, creating a new and comprehensive system of air pollution controls. The EPA Administrator was directed to establish ambient "primary standards" for air pollutants injurious to the public health, defining the maximum permissible concentrations tolerable in the surrounding air; and the States were directed to adopt implementation plans to achieve these primary standards by specified dates [42 U.S.C. §§ 1857c-4]. In addition, the States were authorized to adopt more stringent standards and implementing regulations if they chose [42 U.S.C. § 1857d-1].

In accordance with these provisions, EPA established primary standards for, among other pollutants, carbon monoxide (CO) and nitrous oxide (NO_x), specifying the concentrations above which public health hazards would result [40 CFR § 50.1 et seq.];

and within New York, the attainment date for these standards has been fixed as January 1, 1977 [40 CFR §52.1672(C)(1)]. The VMF will not be completed until after that date; yet despite the attainment mandate, the EIS acknowledges that when the Garage is in operation, violations of both the CO and NO_x standards will occur, with the VMF contributing to these [EIS, p. VIII-19].

In light of the admitted violation of standards that would occur, plaintiffs have contended that the Postal Service cannot build the VMF consistent with requirements of the Clean Air Act. In addition, plaintiffs contend that, at the very least, the Postal Service must obtain an indirect source permit from New York State before it can build the Garage. In this regard, the State agrees and so notified the Service on January 21, 1975 [Exh. R].

The Postal Service, however, takes the position that it has no duty to comply with the laws that bind everyone else. Thus, in this Court, as below, it argues that it is completely exempt from the Clean Air Act; that State laws cannot bind it despite contrary language in Section 118 of the Act; and that even if air quality violations will be the result of the VMF, plaintiffs cannot stop them through judicial action.

1. The Postal Service is Not Exempt From the Requirements of the Clean Air Act

As its first line of defense, the Postal Service seeks

to avoid the application of the clean air laws by invoking, once again, 39 U.S.C. §410. The Federal Clean Air Act and any regulations adopted in implementation of clean air standards simply do not apply, so the Postal Service claims, to the Garage or any other Postal Service facilities.

We have already set forth in Point One of this Brief the shortcomings of the Postal Service's claim that NEPA does not apply to it, and the points made in that discussion are generally applicable here as well. Neither the language of the Postal Act nor its legislative history lends credence to the claim that the Postal Service was to be freed from the environmental policies and controls that Congress has only recently enacted to ensure respect for the environment and to provide means of protecting the public health and welfare.

Furthermore, in the case of the Clean Air Act, there are three additional factors which make its application to the Postal Service even more apparent.

First, the Clean Air Act in its current form, including Section 118 which binds Federal instrumentalities to compliance with State laws, was not enacted until December 31, 1970 -- after passage of the Postal Reorganization Act. Thus, it can hardly be claimed that Congress intended by 39 U.S.C. §410 to exempt the Postal Service from clean air requirements, since there were none affecting it at the time.

Second, the language of 39 U.S.C. §410, with its reference to laws dealing with public or Federal contracts, property, works or the like, is even less arguably applicable to the Clean Air Act than NEPA; for the Clean Air Act deals with emission controls in an effort to safeguard the public health, and to that end, directs the setting of standards applicable to all. It has nothing whatever to do with the administrative morass surrounding public property, contracting and personnel practices, which is the subject of the Section 410 exemption.

Third, the Clean Air Act, as indicated, was drawn to protect the public health and safety, and to that end has been made applicable to both the private and the public sectors. Thus in its basic format, all new emission sources must meet specified effluent limitations, including, Under Section 118, sources operated by the Federal government and its instrumentalities to the same controls [42 U.S.C. §1857 f]. Were the Postal Service now to be deemed exempt from the Clean Air Act and Section 118, this would create a completely anomalous situation; for the Postal Service would then stand alone as the only entity -- public or private -- that was not bound by clean air standards. Clearly, such a result was never intended by Congress, nor does any statute so suggest.

2. The Postal Service Must Obtain a State Indirect Source Permit for the VMF

In implementation of the directives of the Clean

Air Act and in an effort to make its anti-pollution efforts more effective, New York State, in November 1973, adopted amendments to its existing air pollution regulations which established permit requirements for so-called indirect sources -- that is, new highways and other facilities that could be expected, by their nature, to generate vehicle traffic and resulting air pollution. More specifically, the amendments defined indirect sources to include, among other things, "any garage or parking facility in the County of New York" and, in conjunction with the existing permit system, provided that no construction of such a garage or parking facility could begin after November 5, 1973, unless there had first been obtained an indirect source permit approving the facility as consistent with clean air standards [6 NYCRR §200.1(d), as amended, effective Nov. 5, 1973; and 6 NYCRR Part 201].* The Postal Service Garage, constituting a garage and parking facility in New York County, the construction of which would begin after 1973, clearly fell (and falls) within the definition of uses that require permits.

The amended State regulations, including the portions that established permit requirements for indirect sources, were subsequently submitted to EPA for inclusion as a part of the State Implementation Plan. However, because certain parts of the

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* The amendments have subsequently been incorporated in a revised Part 203 of 6 NYCRR, which is included as Exhibit R in the Appendix. The definitions and the permit requirements have not been affected by the revision, and there is no dispute that if the Postal Service is subject to the State requirements, a permit for the VMF will have to be obtained.

overall regulations not dealing directly with indirect sources were conditional in nature, EPA could not approve them [39 F.R. 7271, 7282-8 (Feb. 25, 1974)]. Nonetheless, the regulations and indirect source controls remained (and remain) effective as State law, as expressly provided in Section 116 of the Clean Air Act [42 U.S.C. §1857d-1]. (Furthermore, the State has since corrected the earlier deficiencies, and the revised regulations are now pending approval by EPA.)

Normally, Federal agencies and instrumentalities are not subject to State and local laws -- and this is the position that the Postal Service takes here. Sovereign immunity, it contends, and the Supremacy Clause preclude the application of the State permit requirements to the VMF or any other Postal facility. But in this, the Service is mistaken; for the Clean Air Act, by its own terms, expressly subjects Federal agencies and instrumentalities to both State and local requirements respecting air pollution control, with Section 118 providing in pertinent part:

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." [42 U.S.C. §1857f] (Emphasis added).

Thus, the Section effectively waives -- not only for the Postal

Service, but for all Federal entities -- the sovereign immunity and supremacy of Federal jurisdiction that otherwise might obtain, and expressly binds such Federal bodies to comply with applicable state and local air pollution requirements.

The Postal Service barely mentions Section 118 in its Brief, and never deals with its specific language. Instead, it relies on the recent Sixth Circuit decision in Kentucky ex rel Hancock v. Ruckelshaus, 497 F.2d 1172 (1974), that Congress did not waive immunity or supremacy when it enacted Section 118. However, the logic of this decision, based, as it is, on a substantive-procedural distinction that is not reflected in the statute and departing completely from the statutory language, is not compelling. This was pointed out in the later and contrary decision of the Fifth Circuit in Alabana v. Seeber [7 ERC 1025 (1974)], to which this Court is respectfully referred, wherein Section 118 was held to mean what it says -- to wit, that Federal entities must comply with State and local regulations controlling air pollution, and that State permit regulations, such as those involved in the instant case, are among the binding requirements.

We shall not repeat here the points that are set out so clearly in the Fifth Circuit's majority opinion, but in emphasis, note the following:

First, the language of Section 118 is so clear on its face that we think it difficult to assign any meaning other

than that State permit requirements are binding. In this connection, we note that Section 118 speaks in terms of State requirements for the control of pollution, and point out that permit systems have long been the principal means of such control. Indeed, on a prospective basis, which is particularly the concern of the Clean Air Act, permit systems would appear to be the only effective means of controlling air pollution, since otherwise huge investments might be made without prior clearance, only to discover violations, in which case there would be a devil's choice to make (i.e., either suffer the emissions or waste the millions invested). Congress can hardly have envisioned such a restrictive approach.

Second, in enacting Section 118, Congress did so against a background of dissatisfaction with Federal entities in meeting pollution standards which, until then, had been subject to voluntary compliance only under Section 111 of the prior act; and as stated by the Fifth Circuit:

> "In strengthening the Act by replacing that Section [111] with present §118, Congress sought to depart from the policy of voluntary compliance and make emission limitations enforceable against Federal facilities." [7 ERC at 1028-29].

Yet if the position of the Postal Service were held to prevail, it would be back, once again, to voluntary compliance; and here there would be none since, despite admitted violations of the primary standards, the Service intends to proceed with the VMF.

In its brief, the Postal Service seeks to avoid the application of Section 118, and to distinguish the holding of Alabama v. Seeber, on the grounds that the New York permit requirements have not yet been accepted by EPA as part of the State's implementation plan. In this regard, however, the Service has misstated the holding of Seeber, which was not, as it claims, limited to State regulations approved as part of an implementation plan; and far more importantly, it has ignored the unambiguous language of the statute. For Section 118 does not restrict its application to State and local requirements approved by EPA, but, to the contrary, refers quite simply and without qualification to "State . . . and local requirements respecting control . . . of air pollution." In short, it is quite enough that the State itself has adopted, as it has here, indirect source regulations imposing controls on air pollution.*

If, of course, the State had adopted regulations less stringent than those in effect under Federal or some other standards, then they would not apply. But that is clearly not the case here. To the contrary, the State regulations are the only controls for indirect sources presently in effect, and that being the case, Section 116 of the Clean Air Act [42 U.S.C.

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* The waiver of supremacy and sovereign immunity is, of course, contained in Section 118 itself, and does not depend on EPA approval, as the Postal Service appears to imply.

§1857d-1] expressly makes them applicable and binding.

Further, EPA has recently underscored the critical role of State regulations -- whether or not approved as a part of an implementation plan -- in the indirect source area. Thus, in announcing on December 30, 1974, that its own indirect source controls would not take effect until July 1, 1975, EPA went out of its way to emphasize the continuing applicability of State regulations, stating:

> "This suspension [of EPA coverage] will have no effect on the applicability or validity of existing state indirect source laws or regulations, nor will it affect state indirect source laws or regulations which may be adopted hereafter, whether or not submitted to EPA for approval." [39 F.R. 45014-15 (December 30, 1974)]

In New York, regulations requiring permits for facilities such as the VMF have been in operation for a year; and effective January 13, 1975, a new set of comprehensive regulations was adopted confirming this coverage [6 NYCRR Part 203, Section 203.3(a)(1), included as Exh. PP in the Appendix. Thus, under the new regulations, as well as the old, a permit for the VMF clearly appears to be required.

We also deem it important to point out that EPA's "disapproval" of the earlier New York indirect source regulations, upon which the Postal Service places such emphasis in its brief, had absolute nothing to do with the issues involved in this case -- to wit, the need to obtain a permit before adding new

parking spaces in New York County. Rather, as noted expressly in the EPA statement at the time, the overall regulations could not be accepted because one section allowed the granting of conditional permits contrary to EPA guidelines, and several other requirements included in the guidelines had not been adequately covered [39 F.R. 7292-3 (Feb. 25, 1974), setting forth amendment to 40 CFR §§ 52.1670, 52.1680]. But these shortcomings are in no way involved here, and it would be ironic indeed if the Postal Service were allowed to escape compliance altogether not because it is not covered, but because the prior regulations did not guarantee against other polluters escaping. The fact that New York has recently revised its regulations to cure the earlier defects simply serves to underscore the hollowness of the Postal Service's position.

Finally, with respect to the Postal Service's position that this Court is without jurisdiction to entertain plaintiffs' suit under Section 304, the simple answer is that, even if this were so, Section 304 is not the exclusive basis for bringing clean air suits, and jurisdiction can be grounded in statutes of general application. [See Conservation Society of Southern Vermont v. Secretary of Transportation, supra, 7 ERC at 1244-45, addressing Section 505 of the Federal Water Pollution Control Act, but discussing as well Section 304 of the Clean Air Act; City of Highland Park v. Train, 374 S.Supp. 758 (N.D. Ill., 1974)]. Here, the alternate bases of jurisdiction include the Postal law

itself, expressly authorizing suits against the Postal Service and granting the District Courts jurisdiction [39 U.S.C. §409] as well as 28 U.S.C. §§1331 and 1361, and Section 118 of the Clean Air Act.

3. The VMF Operations Would Result in Violations of the Implementation Plan

Plaintiffs also argued to the District Court that the admitted continuing violations of primary standards that would follow when the VMF was built constituted a basis for injunction in and of themselves. The Postal Service contended, however, that even if this were so, plaintiffs have no cause of action because the primary standards cannot be directly enforced, and a citizens' suit can be brought only for the violation of an implementation plan.

The District Court did not reach this issue, and due to limitations of space, we shall not brief it now. We simply point out that even accepting the Postal Service's position, a cause of action does lie here, because construction of the VMF would result in a plan violation. Specifically, a principal strategy in the Implementation Plan for New York City is the reduction of parking spaces in middle Manhattan south of 60th Street and the removal of garages to the periphery of the Island [Plan Strategy B-3]. The VMF, adding nearly 1000 parking spaces towards the center of the City, would be in direct violation of this strategy.

CONCLUSION

For the reasons set forth above, the order of the District Court should be affirmed.

Dated: New York, New York
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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have today served two copies of the foregoing Brief on behalf of the Plaintiffs-Appellees on counsel for Defendants-Appellants by mailing two copies thereof by first class mail, postage prepaid, addressed as follows:

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